Anwar et al v. Fairfield Greenwich Limited et al Doc. 307

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

---x

ANWAR, *et al.*,

Plaintiffs,

v.

FAIRFIELD GREENWICH LIMITED, *et al.*,

Defendants.

MASTER FILE NO. 09-CV-0118 (VM)

This Document Relates To:

09-CV-2366 (VM) (*Ferber* Action)
09-CV-2588 (VM) (*Pierce* Action)
09-CV-5012 (VM) (*Morning Mist* Action)
09-CV-5650 (VM) (*Sentry* Action)

---x

DEFENDANT FAIRFIELD GREENWICH ADVISORS LLC'S OBJECTION TO THE MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION ON REMAND MOTIONS

December 3, 2009

Mark G. Cunha
Peter E. Kazanoff
SIMPSON THACHER & BARTLETT LLP
425 Lexington Avenue
New York, New York 10017-3954
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Defendant Fairfield Greenwich Advisors, LLC

Dockets.Justia.com

PRELIMINARY STATEMENT

The removal motions filed by Defendant Fairfield Greenwich Advisors LLC ("FGA") present a narrow question of first impression: whether actions seeking recovery of fees incurred by more than 100 individual investors in investment funds qualify as "mass actions" for CAFA jurisdictional purposes. No court in this district – or anywhere in the country – has ruled on that question or otherwise offered authoritative guidance, and it is appropriate that it now be decided at the district court level. Magistrate Judge Katz agreed in his Report and Recommendation that the removal motions "raised novel issues of law that required this Court to interpret a recently enacted statute." November 13, 2009 Report and Recommendation of United States Magistrate Judge Theodore H. Katz ("Report") at 26.

FGA respectfully submits that the Magistrate Judge erred in two respects.

First, he concluded that the language on the face of the CAFA statute precluded a finding that these actions are "mass actions" involving more than 100 claimants because there are only one or two named plaintiffs in each. *See* Report at 14. But the statute does not require 100 or more *plaintiffs*. Rather, the statute defines "mass action" functionally to include all cases where plaintiffs propose to try "jointly" the claims for monetary relief of "100 or more ***persons***". The 100-person requirement is not defined as the number of plaintiffs, and we believe the Magistrate Judge misinterpreted the statute by equating "persons" with "plaintiffs".

The actual language of the statute focuses on the number of underlying claimants rather than the number of named plaintiffs. Plainly, Congress used the term "mass actions" to broaden the reach of CAFA beyond traditional class actions to encompass cases (no matter how styled) that seek to jointly try the individual damage claims of 100 or more persons. The factual allegations here are that each of these actions has been brought to recover the specific fees incurred individually by more than 100 investors in an investment fund. Since there are more than 100 claimants whose alleged losses are sought to be tried jointly by Plaintiffs, these cases are mass actions subject to federal court jurisdiction under CAFA.

Second, and relatedly, we believe the Magistrate Judge overstated the potential precedential impact of his recommendation on these remand motions by failing to take into account the specific nature of the claims and circumstances Plaintiffs have raised in the removed actions. Viewing the issue to be decided too broadly, the Magistrate Judge failed to focus on the key fact that the claims in these actions seek recovery of fees incurred by individual investors based on their individual account balances in the investment funds. He therefore mistakenly concluded that "if the Court adopts Defendants' position, 'literally any company, public or private, with more than 100 shareholders could be deprived of its chosen forum and haled into federal court.'" Report at 24. The Magistrate Judge's concerns are unfounded.

When properly restricted to the claims and circumstances here, FGA's narrowly-stated grounds for removal would have limited applicability and would not apply to most claims asserted by or in the name of a corporation. Direct or derivative claims by a corporation to recover damages suffered by the corporate entity where the damages are not the aggregation of the specific harm to specific individuals, *i.e.*, the great majority of such claims, are not removable under CAFA (even where the corporation has 100 or more shareholders).

Unlike these typical direct and derivative claims, the actions here seek to jointly try claims to recover the fees incurred individually by more than one hundred investors in each of the investment funds. Essentially, plaintiffs in these actions are suing in the name of the funds, but actually are asserting quasi-class claims by the 100+ investors in the funds. Given the nature of the relief these plaintiffs have chosen to seek, their direct and derivative claims should be considered mass actions that are removable to federal court under CAFA. *See Airlines Reporting Corp. v. S and N Travel, Inc.*, 58 F.3d 857, 862 (2d Cir.1995) (noting that where a plaintiff "acts merely as an agent representing the interests of others," the assignors are the "real and substantial parties to th[e] dispute," and therefore are the appropriate parties that should be considered for determining whether the diversity jurisdictional requirements have been satisfied); *Hilton Hotels Corp. v. Damornay Antiques, Inc.*, No. 99-CV-4883 (MBM), 1999 WL 959371, at *5 (S.D.N.Y. Oct. 20, 1999) ("[T]he standards for determining a 'real party in interest' under Fed.R.Civ.P. 17 and for ascertaining whether diversity jurisdiction exists under section 1332 are not identical.").

Moreover, these cases are brought in parallel with the consolidated *Anwar* class action on behalf of the same investors seeking the same relief in federal court. It surely was not Congress' intent to allow mere form in pleading to evade federal jurisdiction and require wasteful and potentially conflicting parallel state court litigation by and on behalf of the same parties seeking the same relief for the same conduct, particularly where the damages sought are the "monetary relief claims of 100 persons."

For these reasons, and for the reasons stated below and in FGA's prior submissions in opposition to remand, FGA respectfully objects to Sections I and II of the Magistrate Judge's Report and Recommendation.[1]

BACKGROUND

Three derivative actions – *Ferber v. Fairfield Greenwich Group, et al.*, No. 09 Civ. 2366 ("*Ferber*"), *Pierce et al. v. Fairfield Greenwich Group et al.*, No. 09 Civ. 2588 ("*Pierce*"), and *Morning Mist Holding Ltd. et al. v. Fairfield Greenwich Group at al.*, No. 09 Civ. 5012

[1] For the Court's convenience, FGA is attaching as Exhibit A to this Objection copies of the substantive submissions made by the parties in connection with the remand motions. FGA incorporates by reference into the Objection all arguments made in opposition to remand set forth in its prior submissions.

("*Morning Mist*") – were originally filed in New York State Supreme Court and timely removed to this Court under CAFA by FGA and subsequently consolidated into *Anwar*. A fourth case, *Fairfield Sentry Limited v. Fairfield Greenwich Group et al.*, No. 09 Civ. 5650 ("*Sentry*"), was also filed in New York State Supreme Court and timely removed under CAFA and consolidated into *Anwar*.

The *Ferber*, *Pierce*, *Morning Mist*, and *Sentry* actions (collectively, the "Actions") all seek to recover "financial losses in connection with the widely-publicized fraudulent scheme perpetrated by Bernard L. Madoff." Report at 1. The *Ferber*, *Pierce*, and *Morning Mist* actions are brought by individual investors in investment funds managed by the Fairfield Greenwich defendants. The *Sentry* action is brought directly by one of the investment funds against the Fairfield Greenwich defendants. The four Actions seek to recover the fees incurred and other losses suffered by all the investors in the investment funds and the funds themselves. *See* Report at 4-5.

Plaintiffs in *Ferber*, *Pierce*, *Morning Mist*, and *Sentry* moved to remand their actions to state court for lack of subject matter jurisdiction and sought attorneys' fees and costs in connection with the remand motions. On May 1, 2009, the Magistrate Judge granted FGA's request for limited jurisdictional discovery from ten limited partners in Greenwich Sentry Partners ("GSP"), the investment fund at issue in the *Pierce* action, to establish the number, identity, and domicile of the beneficial owners of the limited partners in that fund. *See* May 1, 2009 Memorandum and Opinion and Order at 8 (describing FGA's arguments that: (a) derivative actions may be removable under the 'mass action' provision of CAFA and (b) the beneficial owners of GSP may count towards the 100-person jurisdictional requirement, raised "legal questions for the District Court to consider, should it choose to do so, in connection with the *Pierce* motion."). Briefing on the remand motions was completed on November 6, 2009.

On November 13, 2009, the Magistrate Judge submitted his Report and Recommendation in favor of remand but denying Plaintiffs' requests for attorneys' fees and costs. Report at 26. Magistrate Judge Katz concluded that the Actions did not qualify as "mass actions" subject to federal court jurisdiction under CAFA. *Id.* at 11, 24. In recommending remand of the Actions, the Magistrate Judge framed FGA's position on removal under CAFA as requiring the "Court to infer the existence of multiple plaintiffs when, in fact, there are, at most, only two." *Id.* at 10. As discussed below, FGA respectfully submits that the Report and Recommendation is based on a misinterpretation of FGA's position and the applicable provisions of CAFA, and therefore the Court should deny the remand motions.[2]

ARGUMENT

I. THE ACTIONS ARE "MASS ACTIONS" FOR PURPOSES OF CAFA AND SHOULD REMAIN IN FEDERAL COURT

CAFA defines a "mass action" as a case in which "monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact…." Report at 14 (quoting 28 U.S.C. § 1332(d)(11)(B)(i)). This is exactly what the Actions are attempting to do.

Under CAFA, "a mass action shall be deemed a class action" and is removable to federal court if it otherwise satisfies the requirements of 28 U.S.C. § 1332(d)(2) through (10). 28 U.S.C. § 1332(d)(11)(B)(i). As noted in the Report, the parties do not dispute that the minimal diversity and aggregate amount in controversy requirements of CAFA are met. Report at 9. Thus, the

[2] The Magistrate Judge's Report and Recommendation is subject to "de novo review under Rule 72." Report at 2 n.3 (quoting *Williams v. Beemiller, Inc.*, 527 F.3d 259, 266 (2d Cir. 2008)).

federal jurisdiction question is how to define "mass action" for purposes of CAFA and the related question of how to calculate the "100 or more persons" requirement therein.

A. The Magistrate Judge's Recommendation Hinges On A Misinterpretation Of The Term "Mass Actions" Under CAFA

In his Report, the Magistrate Judge repeatedly assumed that CAFA's use of the phrase "100 or more persons" refers to the number of actual plaintiffs in the action. *See* Report at 10 ("Defendants propose an interpretation of CAFA that would require this Court to infer the existence of multiple plaintiffs when, if fact, there are, at most only two."); *id.* at 11 ("To reach CAFA's requirement of 100 plaintiffs…"); *id.* at 14 ("The claims in each of these actions are brought by no more than two partners or shareholders on behalf of one entity, not '100 or more persons' as the statute clearly requires."). Based on this assumption, the Magistrate Judge found that the Actions were not mass actions under CAFA because they each were brought by one or two plaintiffs, not one hundred or more, and accordingly recommended remand.

We respectfully submit that the Magistrate Judge misread the statutory language. CAFA does not require that every mass action must be brought by 100 or more plaintiffs – the statute refers to the "monetary relief claims of 100 or more *persons*" (not 100 or more plaintiffs). The reference to "persons" is particularly critical because later in the same sentence the statute uses the term "plaintiffs' claims." Plainly, the statute does not use the terms "persons" and "plaintiffs" interchangeably, and therefore the Magistrate Judge's assertion that removal of the Actions under CAFA was foreclosed by the statutory language is mistaken. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (rejecting statutory construction which would have rendered a term in the statute "insignificant, if not wholly superfluous" and stating, "[i]t is our duty to give effect, if possible, to every clause and word of a statute" and "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotations and citations omitted)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (internal quotations and citations omitted).

Indeed, the actual language of the statute makes clear that it is the number of underlying claimants (or "persons") whose claims are "proposed to be tried jointly" that must reach 100 for the action to qualify as a "mass action." The number of plaintiffs who assert those claims on behalf of the 100 or more claimants or persons simply is not determinative or even relevant under the statute. For this reason, the Magistrate Judge erred in concluding that the Actions are not mass actions under CAFA.

B. Each Action Proposes To Jointly Try The Claims Of 100 Or More Persons As Required By The Statute

In the removal petitions and papers filed in opposition to remand, FGA demonstrated that the Actions were filed by or derivatively on behalf of investment funds each of which has in excess of 100 investors. The *Morning Mist* and *Sentry* actions both seek recovery of losses, including management and other fees, allegedly incurred by Fairfield Sentry Limited and its approximately 700 shareholders. *See* Report at 11 & n.8. The plaintiff in *Ferber*, which brought a derivative action "for the benefit of Greenwich Sentry and its Limited Partners" (*Ferber* Compl. ¶ 1), has not contested that the Greenwich Sentry investment fund has over 100 limited partners.[3] In the *Pierce* derivative action, which like *Ferber* is brought for the benefit of the limited partners in an investment fund (*i.e.*, GSP), FGA obtained jurisdictional discovery

[3] Indeed, Derivative Plaintiffs appear to concede this point. *See* Derivative Plaintiffs' Reply In Further Support Of Remand, April 21, 2009, Dkt. No. 218, at 2 ("That there may be over 100 investors in two of the Funds (Fairfield Sentry Ltd. and Greenwich Sentry, LP) is beside the point.").

authorized by the Magistrate Judge demonstrating that the current limited partners in that fund included over 100 beneficial equity holders.[4]

Plaintiffs in these Actions seek to recover the fees and other losses incurred by these shareholders, limited partners, and beneficial equity holders in the funds. *See* Report at 4 ("Defendants, however, had for years received management and performance fees in connection with these investments which, among other things, Plaintiffs now seek to recover under various tort and contract theories.")). While the Magistrate Judge criticized Defendants' counting of investors at different "tiers," that counting is necessary under CAFA to determine whether the Actions seek to jointly try the monetary relief claims of 100 or more persons because the complaints expressly seek the recovery of fees and other expenses incurred by investors in the funds – *i.e.* the "persons" who must be counted for CAFA purposes.[5] Because Plaintiffs' complaints seek recovery for losses suffered by those investors, they must be counted regardless of which "tier" they fall into.

---

[4] In his Report, the Magistrate Judge questioned the methodology FGA employed in calculating the number of beneficial equity holders in GSP for the *Pierce* action. *See* Report at 13 n.9. Specifically, the Magistrate Judge took issue with counting investors underlying the limited partners in GSP. *Id.* at 12-13. Again, it is appropriate to count these underlying investors based on the specific statutory language of CAFA focusing on the number of persons whose monetary relief claims are proposed to be tried jointly. But even if the Magistrate Judge is correct, there would still be over 100 beneficial equity holders in GSP. Under the Magistrate Judge's computation, the number of beneficial equity holders in GSP would be reduced, at most, by 4 persons. *See id.* at 13 n.9 (counting one limited partner as a single person rather than two persons investing as joint tenants; counting another limited partner as a single person rather than three persons investing as joint tenants where two of the persons have died unbeknownst to FGA; and counting two additional limited partners as a single person). Omitting these four persons, the number of beneficial equity holders in GSP would decrease from 109 to 105 – which is still 5 persons over the 100-person minimum. Moreover, FGA notes that with respect to the first limited partner discussed in footnote 9 of the Report, the subscription agreement attached to the Amended Sirkis Declaration was for its subscription to GS (GSP's predecessor fund) (Sirkis Am. Decl. Ex. 15). Attached as Exhibit 57 to that Declaration is a response to the jurisdictional discovery subpoena from the same limited partner indicating that two individuals invested in GSP as joint tenants.

[5] *See, e.g.*, *Pierce* Compl. at 61 (seeking an award of restitution and the imposition of a constructive trust over the "monies received by FG Bermuda and each of the other Fund Defendants as Management Fees and/or Incentive Allocations based on the artificially inflated capital accounts of the Limited Partners"); *Ferber* Compl. at 62 (same); *Morning Mist* Compl. ¶¶ 308; 314 (seeking an award of unjust enrichment for "Management Fees and Performance Fees" paid to FG Limited and FG Bermuda based on inflated "net asset value of the Fund and its shares"); *Sentry* Compl. ¶¶ 80, 89, 95, 101, 104-05 (seeking the return of "all performance and management fees" that were paid to

In so arguing, FGA does not contest the Magistrate Judge's conclusion that the Derivative Plaintiffs were free to assert their claims derivatively (*see* Report at 17) and that the Sentry plaintiff's direct claim is a claim that belongs to the Fairfield Sentry fund (*id.* at 24). But while true, that conclusion misses the point. The issue on remand is not whether the action is derivative or direct or whether the action is brought by one, two or 100 plaintiffs. The question is whether – for CAFA jurisdiction purposes *only* – an action proposes to try jointly claims for monetary relief of 100 or more persons. The answer here is clearly and unequivocally yes. Because each of the Actions is brought to jointly recover the fees and losses incurred by 100 or more investors, the Actions are "mass actions" for purposes of CAFA.

The Magistrate Judge's reliance on the fact that FGA intends to argue in its upcoming motion to dismiss the consolidated *Anwar* complaint that shareholders, limited partners, and beneficial equity holders in the funds do not have standing to assert direct claims against the defendants (*see* Report at 20), while also true, again misses the point. The issue before the Magistrate Judge and now before this Court is a jurisdictional one. The CAFA jurisdictional test focuses on the nature of the relief sought in the action (*i.e.*, "claims for monetary relief of 100 or more persons"), not the form in which the action is pled (*i.e.*, direct, derivative, shareholder, class, individual, etc.).[6] Indeed, it appears that Congress incorporated the concept of a "mass

---

defendants) and Exs. 2-4 (Investment Management Agreements) at ¶7 or ¶ 8 ("Shares of the Fund shall be subject to the payment of the Performance Fee for the portion of each calendar quarter that they are issued and outstanding.").

6 This Objection addresses whether the Actions qualify as mass actions under the language and intent of CAFA. It does not address whether the class claims in *Anwar* can be sustained given that the alleged injury to the class members is derivative to the injury to the Funds. That issue will be addressed in FGA's motion to dismiss the Second Consolidated Amended Complaint.

action" into CAFA to ensure that quasi-class actions that seek to jointly try the individual damage claims of 100 or more persons can be removed to federal court.[7]

As the Magistrate Judge notes, Plaintiffs are indeed "the 'master[s] of the complaint'". *See* Report at 16. And it is precisely because they asserted in their complaints claims for monetary relief of 100 or more persons that Plaintiffs are subject to federal court jurisdiction. These are mass actions that were properly removed pursuant to CAFA and consolidated into *Anwar*. Moreover, remanding these Actions to state court would create a parallel litigation track in which a separate group of plaintiffs' counsel would pursue the same relief for the same conduct that is the subject of the *Anwar* consolidated action. In adopting CAFA, Congress intended to avoid – not encourage – that type of wasteful litigation. *See* 28 U.S.C. § 1711(b)(2) (One of the purposes of CAFA was to "restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction[.]").

C. The Securities Litigation Uniform Standards Act

A comparison of the text of CAFA with the language Congress used in the Securities Litigation Uniform Standards Act ("SLUSA") further confirms that removal was proper under CAFA.

---

[7] As the Magistrate Judge notes in his Report, CAFA's legislative history suggests that *one* reason Congress created the mass action category was to ensure that coordinated actions brought by multiple plaintiffs "that resemble a purported class action" could be removed to federal court. Report at 17-18 (quoting the Senate Report on CAFA). The Actions here, which seek to jointly try the claims for fees incurred by individual investors in investments funds, not only "resemble" a class action, they are functionally equivalent to the coordinated actions by multiple plaintiffs that are referenced in the legislative history, and also are functionally equivalent to the class actions that are proceeding by the same putative plaintiffs for the same relief in the consolidated *Anwar* action before this Court.

SLUSA was adopted a few years prior to CAFA. It provides for the removal to federal court of certain securities fraud class actions. 15 U.S.C. § 78bb(f)(2). Unlike CAFA, however, SLUSA explicitly precludes from removal "an exclusively derivative action brought by one or more shareholders on behalf of a corporation." 15 U.S.C. §§ 77p, 78bb. Explicit exclusion of derivative actions in SLUSA coupled with no such exclusion in CAFA, a statute covering similar subject matter and passed in a similar time period, clearly implies that Congress did not intend to exclude derivative claims from coverage under CAFA. *C.f. Sung ex rel. Lazard Ltd. v. Wasserstein*, 415 F. Supp. 2d 393, 408 (S.D.N.Y 2006) (Marrero, J.) (derivative action was not subject to removal under SLUSA specifically because, unlike CAFA, SLUSA explicitly precludes derivative claims from removal).

The recent case of *Oregon ex rel. Oregon 529 Coll. Savings Bd. v. Oppenheimerfunds, Inc.*, No. 09-CV-6135, 2009 WL 2517086 (D. Or. Aug. 14, 2009), further supports FGA's position.[8] Defendants in *Oppenheimerfunds* argued that removal under SLUSA was appropriate as a covered "class action" because it involved damages sought on behalf of thousands of trust beneficiaries. The court examined whether damages were in fact "sought on behalf of more than 50 persons or prospective class members" as required for SLUSA removal. The court noted that: "At first blush, the answer to the questions appears simple – the Oregon 529 College Savings Board seeks damages on behalf of the thousands of OCS plan participants alleging misrepresentations and omission of a material fact in connection with the purchase or sale of the Core Bond Fund. . . ." *Id.* at *3. While the court ultimately found that the Oregon 529 College Savings Board should be considered a single plaintiff, it reached this conclusion only because SLUSA explicitly states that "a corporation, investment company, pension plan, partnership, or other entity, *shall be treated as one person or prospective class member*, but only if the entity is not established for the purpose of participating in the action." 15 U.S.C. § 78bb(f)(5)(D) (emphasis added). In stark contrast with SLUSA, CAFA does not have a similar counting provision. The fact that such a counting provision explicitly exists in SLUSA, coupled with no such provision in CAFA, indicates that Congress intended for claimants to be counted differently under CAFA than they are counted under SLUSA.

---

[8] Without further explanation, the Magistrate Judge determined that the *Oppenheimer Funds* case was not relevant to the remand motions because the case was decided under SLUSA. *See* Report at 23.

II. THE COURT SHOULD ADOPT THE MAGISTRATE JUDGE'S RECOMMENDATION DENYING PLAINTIFFS' REQUESTS FOR ATTORNEYS' FEES AND COSTS

In recommending that Plaintiffs' requests for attorneys' fees and costs be denied, the Magistrate Judge acknowledged that "Defendants raised novel issues of law that required this Court to interpret a recently enacted federal statute." Report at 26; *see also id.* at 10 ("The question of whether a derivative action brought behalf of a corporation or partnership in which there are over 100 investors qualifies as a "mass action" under CAFA is a matter of first impression in this Court."); *id.* at 19 (noting "the dearth of case law on the treatment of a derivative action under CAFA"); *id.* at 26 (noting the absence of "any clear authority in this Circuit addressing the issues raised in the remand motions").

Given this complete absence of authority on the central issue raised by the removal motions, FGA unquestionably had an objectively reasonable basis to remove the Actions and oppose remand and therefore, even should this Court disagree with FGA's position urged before Magistrate Katz and here, there is no basis to award Plaintiffs attorneys' fees and costs. *See Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005) (noting that "'absent unusual circumstances,'" attorney's fees should not be awarded when the removing party has an "'objectively reasonable basis for seeking removal'").[9] Indeed, any suggestion that the plain language of the statute obviates FGA's reasonable basis to remove is belied by the fact that, we believe, the Magistrate Judge himself misinterpreted the language defining a "mass action" under CAFA and thereby erroneously concluded that the Actions were not subject to Federal court jurisdiction under CAFA. Moreover, Plaintiffs filed each of the Actions in state court *after* this Court entered the Consolidation Order and Order for the Appointment of Interim Co-Lead Counsel on January 30, 2009 in *Anwar*, in which putative class plaintiffs were already seeking the same relief for the same conduct. Thus, not only did FGA have an objectively reasonable basis to remove the Actions under CAFA, but removal prevented wasteful and potentially conflicting parallel litigation from proceeding in state court.

For these reasons, Plaintiffs should not be awarded attorneys' fees and costs.

---

[9] *See Genton v. Vestin Realty Mortgage II, Inc.*, No. 06 Civ. 2517-BEN (WMC), 2007 WL 951838, at *3 (S.D. Cal. Mar. 9, 2007) (declining to grant award of attorneys' fees in connection with removal under CAFA and noting that "[v]ery little case law" exists regarding the exceptions to CAFA); *Carmona v. Bryant*, No. 06 Civ. 78-S (BLW), 2006 WL 1043987, at *3 (D. Idaho Apr. 19, 2006) (same); *Ind. State Dist. Council of Laborers & Hod Carriers Pension Fund v. Renal Care Group, Inc.*, No. Civ. 3:05-0451, 2005 WL 2000658, at *2 (M.D. Tenn. Aug. 18, 2005) (same). *See also Cinquemani v. Ashcroft*, No. 03-CV-576S, 2006 WL 543783, at *3 (W.D.N.Y. Mar. 3, 2006) (denying attorneys' fees where the case presented "a novel issue on which there is little precedent") (internal quotations omitted); *Verri v. Nanna*, 3 F. Supp. 2d 439, 441-442 (S.D.N.Y. 1998) (denying attorney's fees where the issue being litigated was one of first impression in the Circuit and turned on a "novel and complex" issue of law); *Bourne Co. v. Walt Disney Co.*, No. 91 Civ. 0344, 1994 WL 263482, at *2 (S.D.N.Y. June 10, 1994), *aff'd*, 68 F.3d 621 (2d Cir. 1995) (denying attorney's fees because of "'the presence of a complex or novel issue of law that the defendants litigate[d] vigorously and in good faith'"); *Raff v. Maggio*, 743 F.Supp. 147, 151 (E.D.N.Y. 1990) (denying attorney's fees because "litigation over a first impression issue cannot be characterized as bad faith conduct."); *Bourne Co. v. MPL Commc'ns, Inc.*, 678 F.Supp. 70, 72 (S.D.N.Y. 1988) (denying attorney's fees "[g]iven the novelty of the issues involved in this action, and the lack of any bad faith on the part of defendants").

CONCLUSION

For the foregoing reasons, Defendant FGA objects to the Report and Recommendation submitted by Magistrate Judge Katz to the extent it recommends remand of *Ferber*, *Pierce*, *Morning Mist*, and *Sentry* to state court.

Dated: December 3, 2009
New York, New York

SIMPSON THACHER & BARTLETT LLP

By: ______________________________

Mark G. Cunha
mcunha@stblaw.com
Peter E. Kazanoff
pkazanoff@stblaw.com
425 Lexington Avenue
New York, New York 10017
Telephone: (212) 455-2000
Facsimile: (212) 455-2502

Attorneys for Defendant Fairfield Greenwich Advisors, LLC